(19,006.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 355.

WESLEY E. TRAVIS, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the Court of Claims of the United States.

WESLEY E. TRAVIS, Claimant,
vs.
THE UNITED STATES. } No. 22814.

I.—*Petition. Filed March* 3, 1902.

To the honorable the justices of the Court of Claims:

The above-named claimant, Wesley E. Travis, respectfully represents—

1. That he is a citizen of the United States, now residing in Salt Lake City, State of Utah, and brings this suit in his own right in respect of the matters hereinafter set forth.

2. That heretofore, to wit, on the 15th day of September, 1896, the then Postmaster General of the United States, acting therein for and on behalf of the United States, advertised for proposals for transporting the mails in various cities of the United States, and, among others, on route No. 404,011, being the covered screen wagon mail station service, at Boston, Massachusetts, for the term from July 1, 1897, to June 30, 1901.

2 3. That, pursuant to said advertisement and the several matters therein set forth and contained, claimant made and filed with the Post-Office Department a proposal for the performance of said service for the period named in said advertisement, to wit, from July 1, 1897, to June 30, 1901, inclusive, naming as the compensation to be received by him therefor the sum of three thousand seven hundred and eighty dollars ($3,780) per annum; that his said bid was thereafter duly accepted by said department, and award of said contract made to claimant under date December 21, 1896; and that thereupon, to wit, in January, 1897, claimant entered into a contract, in writing, with the United States, with surety, for the performance of said service during the period aforesaid, and which said contract was duly approved and accepted by said department.

Claimant shows that he is unable at this time to attach hereto as a part of this petition copy of said contract, inasmuch as all copies thereof were and are retained by the said department.

4. Claimant further shows that the contract having been so entered into with him, as aforesaid, he made preparation for the due and proper performance thereof, and in that behalf expended large sums of money, to wit, the sum of five hundred dollars ($500).

5. He further shows that, notwithstanding the fact that he was at all times ready, willing, and able to perform the service so embraced in said contract according to the terms thereof, and so repeatedly tendered himself to the defendant, yet nevertheless, against the protest and objection of claimant, the defendant thereafter, and without any just cause or reason therefor, refused to permit claimant

to perform the service so embraced in his said contract; and in further violation of the rights of claimant, and in express violation and disregard of the said contract so entered into and existing, as aforesaid, the defendant entered into a contract with another, covering said route No. 404,011, and likewise covering the same period aforesaid.

6. Claimant avers that he in no way acquiesced in or assented to the matters last hereinabove referred to, and, on the contrary thereof, protested and objected thereto, but without avail.

7. Claimant further shows that the difference between the cost to claimant of performing the service under his said contract and the amount which by the terms thereof he was entitled to receive therefor, covering the said contract period of four years, was the sum of, to wit, five thousand dollars ($5,000); of all of which gains and profits claimant was wrongfully deprived by the action of the defendant, as hereinbefore set forth.

8. Claimant avers that he is entitled to the moneys herein named, and that said amount is justly due and owing to him from the United States after allowing all just credits and set-offs; that no assignment or transfer of the claims hereinbefore set forth, or any part thereof, or any interest therein, has been made by him to any one whomsoever or by any one in his behalf, and that he has, at all times, borne true allegiance to the United States.

Wherefore, the premises considered, claimant demands judgment against the United States in the sum of five thousand five hundred dollars ($5,500).

WESLEY E. TRAVIS, *Claimant.*

A. A. HOEHLING, JR.,
Attorney for Claimant.

Post-office address of claimant, Wesley E. Travis, Salt Lake City, Utah.

Post-office address of attorney for claimant, A. A. Hoehling, Jr., 1416 F street N. W., Washington, D. C.

SALT LAKE CITY, } ss:
State of Utah, }

Before me, the undersigned, personally appeared Wesley E. Travis, who, being by me first duly sworn, on oath says that the several matters and things set forth and contained in the foregoing petition by him subscribed are true, as he verily believes.

WESLEY E. TRAVIS.

Subscribed and sworn to before me this 25th day of February, A. D. 1902.

BENNER X. SMITH,
Notary Public.

[SEAL.]

II.—*Traverse.*

In the Court of Claims of the United States, December Term, A. D. 1902.

WESLEY E. TRAVIS
vs.
THE UNITED STATES. } No. 22814.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney General.

Filed March 17, 1903.

5 III.—*Findings of Fact and Conclusion of Law and Opinion of the Court and Dissenting Opinion in the Case of Slaven vs. The United States.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

Claimant is a citizen of the United States, a resident of Salt Lake City, Utah; that he has at all times borne true allegiance to the United States; that he is the sole owner of the claim embraced in this suit, and that no transfer or assignment of said claim, in whole or in part, or of any interest therein, has ever been made by him.

II.

On September 15, 1896, the then Postmaster-General of the United States advertised for proposals for transporting the mails in various cities of the United States, and, among others, on route No. 404011, being the covered screen wagon mail-station service, at Boston, Mass., for the term from July 1, 1897, to June 30, 1901.

III.

Pursuant to said advertisement and the several matters therein set forth and contained, claimant made and filed with the Post-Office Department a proposal for the performance of said service for the

period named in said advertisement, to wit, from July 1, 1897, to June 30, 1901, inclusive, naming as the compensation to be received by him therefore the sum of $3,780 per annum.

A true copy of said proposal is as follows:

Proposal.

Covered screen wagon mail messenger, transfer, and mail station service, city of Boston, Mass., route No. 404011.

The undersigned, Wesley E. Travis, whose post-office address is New York, county of New York, State of New York, proposes
6 to carry the mails of the United States from July 1, 1897, to June 30, 1901, on above-numbered route, being the covered screen wagon mail messenger transfer, and mail station service in the city of Boston, State of Mass., under the advertisement of the Postmaster-General, dated September 15, 1896, and subject to all the requirements and conditions contained therein for the sum of thirty-seven hundred eighty dollars per annum; and if this proposal is accepted he will enter into contract, with sureties to be approved by the Postmaster-General, within thirty days after the date of acceptance.

This proposal is made after due inquiry into and with full knowledge of all particulars in reference to the service; and, also, after careful examination of the conditions attached to said advertisement and with intent to be governed thereby.

Dated November 12th, 1896.

WESLEY E. TRAVIS, *Bidder.*

Examined by Coon.

IV.

Said proposal was thereafter duly accepted by said department, and award of said contract was duly made to claimant on December 21, 1896, and that thereupon contract, in writing, bearing the date last aforesaid, was entered into between the defendant and claimant, with sureties, for the performance of said service during the period aforesaid, and which said contract was duly approved and accepted by said department, and is as follows:

Covered Screen Wagon Mail Station Service in the City of Boston, Mass.

Route No. 404011. Annual rate of pay, $3,780.00. Contractor's address: New York, New York Co., State of N. Y.

This article of contract, made the 21st day of December, eighteen hundred and ninety-six, between the United States of America (acting in this behalf by the Postmaster-General) and Wesley E. Travis, contractor, and Dan Morris, of Cascade, Montana, and Matthew Cullen, of Salt Lake City, Utah, as his sureties:

Witnesseth, that whereas Wesley E. Travis has been accepted as contractor for transporting the mails on route No. 404011, being the covered screen wagon mail station service in the city of Boston, Mass., under an advertisement issued by the Postmaster-General on the 15th day of September, 1896, for such service, which advertisement is herewith referred to and made by such reference a part of this contract, and for performing all new or additional service of said kind which may at any time during the term of this contract be required in said city, at three thousand seven hundred and eighty dollars per year, for and during the term beginning the first day of July, 1897, and ending June 30, 1901.

Now, therefore, the said contractor and his sureties do, jointly and severally, undertake, covenant, and agree with the United States of America, and do bind themselves—

First. To carry said mail, using therefor wagons of the kind hereinafter described in sufficient number to transport the whole of said mail, whatever may be its size, weight, or increase during the
7 term of this contract, and within the time fixed in the pamphlet advertisement of the Postmaster-General dated September 15th, 1896; to carry said mails in a safe and secure manner, in substantial one or two horse wagons of sufficient capacity for the entire mail; the wagons to be employed to be first class, suitable for the proper performance of the service, affording complete protection to the mails from depredation, inclement weather, or other injury, and subject in all respects to the approval of the Postmaster-General; the running gear and body of the wagons to be of any approved design; the wagons to be provided with strong springs; the top to be waterproof; the front, sides, and rear entirely covered by strong wire screens, with adjustable waterproof curtains, and the rear to open by wire-screen doors, which are to be securely fastened by first-class locks; the wagons to be kept thoroughly painted, cleaned, and in good condition, the Postmaster-General reserving the right to vary at any time, when, in his judgment, the service may require it, the plan or form of wagons to be used in the service.

Second. To take the mail from and deliver it into the post-offices and mail stations at such points and at such hours, under the directions of the postmaster at Boston, Mass., approved by the Postmaster-General, as will secure dispatches and connections and facilitate distribution, and at the contractor's expense for tolls and ferriage.

Third. To furnish the number of said wagons that, in the opinion of the postmaster at Boston, Mass., approved by the Postmaster-General, will be sufficient for the prompt and proper performance of the service, including extra wagons to take the place of those that may be temporarily unserviceable or withdrawn from service for repairs.

Fourth. To be accountable and answerable in damages to the United States, or any person aggrieved, for the faithful performance by the said contractor of all the duties and obligations herein as-

sumed, or which are now or may hereafter be imposed upon him by law in this behalf; and, further, to be so answerable and accountable in damages for the careful and faithful conduct of the person or persons who may be employed by said contractor and to whom the said contractor shall commit the care and transportation of the mails, and for the faithful performance of the duties which are or may be by law imposed upon such person or persons in the care and transportation of said mails; and, further, that said contractor shall not commit the care and transportation of the mail to any person under sixteen years of age, nor to any person not of good moral character, or who has not taken the oath prescribed by law, or who can not read and write the English language.

Fifth. To discharge any driver, or other person employed in performing mail service, whenever required by the Postmaster-General so to do; not to transmit by themselves, or any of them, or any of their agents, or be concerned in transmitting, commercial intelligence more rapidly than by mail; not to carry, otherwise than in the mail, letters, packets, or newspapers which should go by mail.

Sixth. To account for and pay over any money belonging to the United States which may come into the possession of the contractor, his sureties, or employés.

Seventh. That foreign mails in transit across the territory of the United States shall, within the meaning of this contract, be deemed and taken to be mails of the United States.

Eighth. To carry post-office blanks, mail locks and mail bags, and all other postal supplies.

8 *Ninth.* To convey, whenever requested so to do, one railway post-office clerk, a substitute, or a messenger, on the driver's seat of each wagon.

Tenth. To perform all new or additional or changed covered screen wagon mail station service that the Postmaster-General may order at the city of Boston, Mass., during the contract term, without additional compensation, whether caused by change of location of post-office, stations, landing, or the establishment of others than those existing at the date thereof, or rendered necessary, in the judgment of the Postmaster-General, for any cause, and to furnish such advance wagons or extra wagons from time to time for special or advance trips as the Postmaster-General may require, as a part of such new or additional service.

For which service, when properly performed, and the evidence thereof shall have been filed in the office of the Second Assistant Postmaster-General, the said Wesley E. Travis, contractor, is to be paid by the United States the sum of three thousand seven hundred and eighty dollars a year, to wit: Quarterly, in the months of November, February, May, and August, or as soon thereafter as accounts can be adjusted and paid, said pay to be subject, however, to be reduced or discontinued by the Postmaster-General, as hereinafter stipulated, or to be suspended and withheld in case of delinquency.

It is hereby stipulated and agreed by the said contractor and his
ireties that the Postmaster-General may change the schedule
nd termini of the route, vary the routes, increase, decrease, or ex-
nd the service thereon, without change of pay; and that the Post-
naster-General may discontinue the entire service whenever the
ublic interest, in his judgment, shall require such discontinuance;
ut for a total discontinuance of service the contractor shall be al-
owed one month's extra pay as full indemnity.

And it is further stipulated and agreed that for a failure to de-
ver not beyond the control of the contractor, or for any delay or in-
erference with the prompt delivery of the mail at the post-office or
ail stations, or for carrying the mail in a manner different or
nferior to that hereinbefore specified; for suffering the mail to be
et, injured, lost, or destroyed; or for any other delinquency or
mission of duty under this contract; for all or any of which the
ontractor shall forfeit, and there may be withheld from his pay,
uch sum as the Postmaster-General may impose as fines or deduc-
ons, according to the nature and frequency of the failure or delin-
uency.

And it is further stipulated and agreed that the Postmaster-Gen
ral may annul this contract for repeated failures for violating the
ostal laws; for disobeying the instructions of the Post-Office De-
artment; for refusing to discharge a carrier or any other person
mployed in the performance of service, when required by the de-
artment; for transmitting commercial intelligence or matter that
ould go by mail, contrary to the stipulations herein; for trans-
orting persons so engaged as aforesaid; whenever the contractor
hall become a postmaster, assistant postmaster, or member of Con-
ress; and whenever, in the opinion of the Postmaster-General, the
ervice can not be safely performed, the revenues collected, or the
aws maintained.

And it is further stipulated and agreed that such annulment shall
ot impair the right of the United States to claim damages from
aid contractor and his sureties under this contract; but such dam-
ages may, for the purpose of set-off or counter claim in the
settlement of any claim of said contractor or his sureties
against the United States, whether arising under this con-
act or otherwise, be assessed and liquidated by the auditor of the
easury of the Post-Office Department.

And it is hereby further stipulated and agreed by the said con-
actor and his sureties that this contract may, in the discretion of
e Postmaster-General, be continued in force beyond its express
rms for a period not exceeding six months, until a new contract
ith the same or another contractor shall be made by the Postmas-
r-General.

And it is further stipulated that no member of, or delegate to, Con-
ress shall be admitted to any share or part of this contract, or to
ny benefit to arise therefrom.

And this contract is further to be subject to all the conditions

imposed by law and the several acts of Congress relating to post-offices and post-roads.

In witness whereof the said Postmaster-General has caused the seal of the Post-Office Department to be hereto affixed, and has caused the same to be attested by the signature of the Second Assistant Postmaster-General, in accordance with the act of Congress approved March 3, 1877 (sec. 3, 19 Stats., p. 335), and the said contractor and his sureties have hereunto set their hands and seals the day and year set opposite their names, respectively.

V.

Thereupon claimant made the necessary preliminary arrangements preparatory to the performance of the said service, and in that behalf expended the sum of $500, and claimant was able, ready, and willing to perform the service under the contract aforesaid, and so repeatedly tendered himself to defendant, but was by the defendant prevented from the performance thereof, as hereinafter set forth.

VI.

The service under said contract covered 28,886 miles per annum, but before the date upon which, under the said contract, claimant was to commence the performance of said service the defendant decreased the service so that it embraced but 23,088 miles per annum, being a decrease merely in the quantity and volume of service required to be performed of 5,798 miles per annum, or a decrease of 20 per cent. from the annual mileage embraced in and called for by the said advertisement.

VII.

On April 27, 1897, defendant issued an order in terms directing the discontinuance of service under claimant's said contract.

A true copy of said order is as follows:

TUESDAY, *April* 27, 1897.

No. of order, 7264.

Name of service, screen wagons. W. E. Travis, $3,780, 404011, Mass., Boston, Suffolk Co.

Order. Discontinue service, to take effect July 1, 1897, and allow contractor one month's extra pay.

(Signed) PERRY S. HEATH,
1*st Asst., Acting Postmaster-General.*

10 And thereupon defendant entered into a contract with one L. C. Slavens, at the rate of $2,475 per annum, covering the same contract period for the service not changed to street car service.

VIII.

Said order to discontinue said service under claimant's contract aforesaid was not made on account of any neglect or default on the

part of claimant in the performance thereof, under the authority given to the Postmaster-General by the contract.

IX.

The difference between the amount it would have cost claimant to perform the service under his said contract during the contract term and the amount claimant would have received under said contract had the service not been discontinued, is the sum of $5,500.

Conclusions of Law.

Upon the foregoing facts the court decides, as a conclusion of law, that the claimant is not entitled to recover, and the petition should be dismissed.

WRIGHT, J., delivered the opinion of the court.

The principles involved in this case are the same, in part, which are concerned in the decision of the case of *Luther Clay Slavens v. The United States*, in which we have, in an opinion, given our reasons for the decision of that case. The reasoning there applies as well to the facts in this case, to which we refer without repetition.

The petition in this case should be dismissed, and it is so ordered.

The opinion of the court and dissenting opinion in the case of Slavens *v.* The United States is as follows:

WRIGHT, J., delivered the opinion of the court.

As may be discovered by reference to the findings of fact, the claimant herein was given three separate contracts for the transportation of mails in covered regulation mail wagons, one in Boston, another in Brooklyn, and still another in Omaha.

There are items for compensation in the cases of all the contracts for service, claimed to have been rendered at defendant's request outside the terms of the contracts, as it has been alleged, and much argument has been urged upon our attention in support and refutation of the respective contentions of the parties in this regard. In addition to these items of so-called extras, the claimant insists upon compensation for carrying the mails between Back Bay and Brookline post-offices, the latter being outside the city of Boston; but as this service was performed without the knowledge or request of any one having defendant's authority, this item, it is plain, cannot be allowed, and it will be dismissed from the case without further notice. (*Whitsell v. United States*, 34 C. Cls., R. 5.)

The chief claim growing out of the Boston and Brooklyn contracts is for a discontinuance by the Postmaster-General of all the service described in, and which was being performed under, those contracts, resulting, as has been urged by claimant, in a breach of the
11 contracts by the defendants, and consequent damage to him.

Both the right of the claimant to compensation for alleged extra services, and to damages for the termination of the services of the claimant, as was done, may be disposed of by correct interpretations of the contracts themselves.

In every essential particular, as relates to the points in question the contracts are alike, and in them claimant agreed to perform all new, or additional, or changed covered regulation wagon, mail, messenger, transfer, and mail-station service that the Postmaster-General might order during the contract term, without additional compensation, whether caused by change of location of post-office, stations, landing, or the establishment of others than those existing at the date of the contract, or rendered necessary, in the judgment of the Postmaster-General, for any cause, and to furnish such advance wagons or extra wagons from time to time for special or advance trips as the Postmaster-General might require as a part of such new or additional service; that the Postmaster-General might change the schedule and termini of the route, vary the routes, increase, decrease, or extend the service thereon, without change of pay; and that the Postmaster-General might discontinue the entire service whenever the public interest, in his judgment, should require such discontinuance, but for a total discontinuance of service claimant should be allowed one month's extra pay as full indemnity.

In support of the right to recover for the items of extra service, as he has described them, claimant has produced argument to prove that such services were extra services, as distinguished from new, or additional, or changed service, described in the contracts, for which no additional compensation should be given. The service so described was such as might be rendered necessary for any cause, in the judgment of the Postmaster-General. It must, of course, be connected with, or an incident to, the covered wagon mail, messenger, transfer, and mail-station service, for such only is the subject-matter of the contracts. It is easily seen that the extra service claimed for readily falls within the class or description of service specified in the contracts, or in part of, or incident to such service, rendered necessary for some sufficient cause. The discretion or judgment of the Postmaster-General, given by the contract, to determine the necessity of such service, ought not to be questioned, unless to prevent unwarranted or unjust interruptions of the contract rights vested in the claimant. It will not be presumed that officer required the performance of services not demanded by the exigencies of the business. Nothing appearing to the contrary, it will be assumed that the service required was necessary to the proper administration of the powers conferred by law upon the head of the department, which was clearly reserved by the stipulations contained in the contracts. The distinction endeavored to be pointed out between extra services and new and additional services is not seen. Extra or additional services are synonymous. There can be no difference in the meaning of the words, and whether called by the one or the other name the services equally fall within the description given to them by the contracts.

It is also insisted that the change of part of the service from covered regulation wagon to street-railway service was unwarranted by the contract. We are unable to give effect to the terms of the
12 contract giving authority to vary the routes, increase or decrease or extend the service thereon, without supporting the

change to street-railway service, the only effect of which was to decrease the service undertaken by claimant, and which was clearly authorized by the contracts. The cause or reason why such change, or decrease of service, might be made was not stated in the contracts, but left to the discretion of the Postmaster-General. It is true the contract provided that such decrease was to be without change of pay, and if this was the only provision of the contract in this regard, there would be much force in claimant's contention, but all the provisions of the contracts must be considered and given the effect intended by the parties when they were entered into.

After the service had been decreased, as stated, the Postmaster-General submitted to claimant a proposition, or suggestion, that he voluntarily relinquish part of the contract price for the continued performance of the services remaining after the change of a part thereof to the street railways, but claimant declined, in which, no doubt, he was clearly within his rights. In other words, he was under no obligation, under the contracts, to continue at a reduced price. So, therefore, the proposition and its rejection had no effect whatever upon the rights of either party, as defined by the contracts, and such were left to be determined by the provisions thereof, according to the terms and stipulations contained therein. The contracts gave to the Postmaster-General authority to discontinue the entire service whenever the public interest, in his judgment, should require such discontinuance, the claimant in such case, to be allowed one month's extra pay, as full indemnity, and this he did in the Boston and Brooklyn contracts.

Against this action of that officer it is argued that he discontinued the service because claimant declined to continue at a reduced rate, but we have not found the action of the officer was so influenced. We must presume, nothing appearing to the contrary—and it does not—such action was influenced solely because, in his judgment, the public interest required the discontinuance of claimant's services under the contracts in question. We can see, also, there was good reason for such conclusion. The service had been rightfully decreased, under the stipulations of the contracts, until the services remaining to be performed were not reasonably worth the original contract rate, and to have continued its payment would have been contrary to public interests, and while claimant was under no obligation to continue in the service at a reduced rate, the head of the department was obligated, as well by the duties of his high office as the provisions of the contract, to subserve the public interests in taking care that no unreasonable compensation was paid for the services actually performed.

It is insisted, however, that by the contracts was meant the discontinuance of the service entirely—that is, an abandonment of all mail service in the cities in question. The mere statement of this position, we think, is its own demolition. It is unreasonable to believe that it was in the mind of anybody, when the contracts were made, that all mail service in any of the cities named would ever be abandoned. Such clearly was not the intention of the parties, in the use of the

language employed. That which was intended, however, and by the words of the contracts accomplished, was that the per-
13 formance of the entire service by the claimant might be discontinued by the Postmaster-General whenever the public interest, in his judgment, required it. The power reserved in the contract to the Postmaster-General to discontinue the entire service, whenever the public interests in his judgment should require it, was the same, and none other, than the power to annul the contract when his judgment advised it should be done (*Garfielde v. The United States*, 93 U. S., 246); and this being true, the only effect of such annulment would be to discontinue the further performance by claimant of the service described in the contract, and not an abandonment, for future time, of the mail service in the cities mentioned, to be let and performed as in other cases.

In conformity to the views herein expressed, the petition of the claimant should be dismissed, and it is ordered accordingly.

NOTT, *Ch. J.*, dissenting:

1. Mr. Justice Davis, in the case of *Otis* (20 C. Cls. R., 315), laid down as the rule of construction for these mail-messenger contracts of the Post-Office that the "new or additional mail-messenger or transfer service" which is to be performed "without additional compensation" must be construed to mean service similar in nature to that required by the contract. He also held that a contract prepared at the Post-Office leaving the contractor no choice as to form or phraseology must be construed in a doubtful case in favor of justice and against the Government. A more sound and just rule of construction was never laid down by a judge. The case was carried to the Supreme Court and affirmed (120 U. S. R., 115).

I perceive nothing in the present case which justifies me in departing from the decision in the case of Otis, followed as it has been by similar decisions in successive cases.

In previous cases it has been held that there is a difference "in kind" between a "mail station" and a "receiving station." The difference in kind between a street car and a post-office seems to me to be much more radical than the difference between a receiving station and a mail station. The system of carrying the mails on street cars did not exist when the contract was made; the claimant did not agree to meet street cars; he did not agree to meet street cars on time; he did not agree to wait for street cars behind time. The Postmaster-General had no right to try this experiment in city mail transportation at the claimant's cost. As was said in a recent case, "a new system of receiving stations" is not "new or additional transfer or mail station service;" and "extra service" is not new or additional service. For the one, the contractor can recover; the other must be performed without additional compensation. (*Union Transfer Co.'s Case*, 36 C. Cls. R., 216.)

* * * * * * *

14 3. It is well settled that where a contract provides that additional work or service or material may be ordered only by a designated officer, such as the head of a department, a subordinate can not bind the defendants by directing the contractor to do additional work, even though the defendants receive a benefit therefrom. That is to say, if the Secretary of the Treasury intends to erect a building at a cost of $100,000, and stipulates that there shall be no additional work done, except when ordered by himself, the officer under whom the work is done can not make the defendants pay $110,000 for a better building than they contemplated erecting through their Secretary of the Treasury. But it is equally well settled that where service is rendered to the Government, which it needs and is invited by an officer having charge of such work, an implied contract will arise and the claimant will recover *in quantum meruit*. (*Clark v. United States*, 95 U. S. R., 539.)

What are the distinguishing facts in this case? The claimant was a contractor doing mail-messenger service in the city of Boston under a contract which, in effect, required him to do whatever the postmaster migh order and direct. There were complaints that the railroad service by which the Brookline post-office was served was inefficient and unsatisfactory. The postmaster, supposing that Brookline was within the territory of the contractor and that the additional service would be performed without additional compensation, ordered the contractor to do it by wagon service. He complied, but appealed to the Postmaster-General, setting forth that the service was beyond his territory. The Postmater-General called on the postmaster for explanations and investigated the facts; he then approved the service and thereby ratified what had been done, and directed the postmaster to take measures for its unbroken continuance and for permanently carrying it on. When these arrangements had been made he relieved the contractor from performing. The case, therefore, is precisely like that of *Otis* (120 U. S. R., 115, 121, 123) where, under a similar contract, the postmaster in New York required the contractor to carry mails beyond his territorial field, viz., from New York to Jersey City, and where the Supreme Court held that this was extra service for which the contractor was entitled to recover.

15 WESLEY E. TRAVIS *vs.* THE UNITED STATES. } No. 22814.

IV.—*Stipulation of Counsel.*

Whereas the claimant in the above-entitled cause desires to prosecute an appeal from the decision and judgment of the Court of Claims, rendered May 25, 1903, and whereas certain slight modification in the findings of fact in said cause are desirable, in order to prevent the possibility of confusion or misconception in the appellate

court, and whereas it is desired to avoid the delay incident to a motion for amendment of findings in the court below during the summer vacation of the court, it is, therefore, this 29th day of June, 1903, mutually stipulated and agreed by and between counsel for the respective parties as follows, to wit:

1. That the covenants and agreements between claimant and defendant, so far as the questions involved in this case are concerned, are fully set forth in the contract made part of the findings of
16 fact filed herein by the court; that the specifications accompanying the advertisement under which said contract was entered into, contain no provisions, so far as material to the determination of this case, which are not set forth in said contract.

2. That to finding of fact numbered II shall be added the following words and figures, to wit:

"Accompanying this advertisement for proposals were detailed instructions to bidders as to the manner and character of the proposed service and contract, which said instructions to bidders contained the following, to wit:

"There will be no diminution of compensation for partial discontinuance of service or increase of compensation for new, additional, or changed service that may be ordered during the contract term; but the Postmaster-General may discontinue the entire service on any route whenever the public interests, in his judgment, shall require such discontinuance, he allowing, as full indemnity to the contractor, one month's extra pay."

3. That to finding numbered VI there shall be added the words and figures following, to wit:

"The aforesaid decrease was brought about by the determination on the part of the Postmaster-General to dispatch certain mails upon the electric street cars rather than by wagon service, thereby expediting the dispatch of the mails."

4. That to finding VII there shall be added the words and figures following, to wit:

17 "The aforesaid contract was made after public advertisement, as required by law, of which the claimant in this case had full notice and on which he could have bid had he desired to do so. He did not bid upon the same."

It is further stipulated and agreed by and between counsel that the foregoing shall be inserted in the record upon appeal and shall be taken as a part thereof as fully and completely as though the same were actually set forth in the findings of fact in this cause.

A. A. HOELING, JR.,
Attorney for Claimant.

L. A. PRADT,
Assistant Attorney-General.

Let the above stipulation be made a part of the record as desired by counsel.

FRANCIS M. WRIGHT, *Judge.*

Filed July 1, 1903.

J. L.

18 V.—*Judgment of the Court.*

WESLEY E. TRAVIS
v.
UNITED STATES. } No. 22814.

At a Court of Claims held in the city of Washington on the 25th day of May A. D. 1903, judgment was ordered to be entered as follows:

The court on due consideration of the premises finds for the defendant and do- order, adjudge and decree, that the petition of the claimant be dismissed.

BY THE COURT.

19 VI.—*Application for and Allowance of Appeal.*

WESLEY E. TRAVIS
v.
THE UNITED STATES. } No. 22814.

Comes now Wesley E. Travis, the above named claimant, by his attorney, and prays an appeal to the Supreme Court of the United States from the judgment of the court herein, of May 25, 1903, dismissing the petition of the claimant.

A. A. HOELING, JR.,
Attorney for Claimant.

Filed July 1, 1903.

Order.

Let the appeal be allowed.

C. C. NOTT,
Chief Justice.

July 1, 1903.

20 Court of Claims.

WESLEY E. TRAVIS
vs.
UNITED STATES. } No. 22814.

I, John Randolph, assistant clerk, Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above entitled cause, of the findings of fact and conclusion of law, of the opinion of the court and the dissenting opinion—of the judgment

of the court dismissing the petition—of the application for and allowance of appeal to the Supreme Court of the United States.

Seal Court of Claims. In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 10th day of July, A. D. 1903.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

21 In the Supreme Court of the United States, October Term, 1903.

WESLEY E. TRAVIS, Appellant,
vs.
UNITED STATES. } No. 355.

It is hereby stipulated and agreed, by and between counsel for claimant and defendant, respectively, that there shall be omitted, in printing the record herein, the whole of paragraph 2 in the dissenting opinion of Chief Justice Nott, delivered in the case of Luther Clay Slavens *versus* United States, and which said dissenting opinion forms a part of the record in this case; said dissenting opinion having been modified by said Chief Justice Nott, by striking therefrom said paragraph 2, after the filing of record herein.

A. A. HOEHLING, JR.,
Attorney for Claimant.
GEORGE H. GORMAN,
Attorney for Defendant.

22 [Endorsed:] File No. 19006 Supreme Court U. S. October term, 1903 Term No. 355. Wesley E. Travis app't *vs.* The United States. Stipulation to omit part of record in printing. Filed Aug. 12", 1903.

Endorsed on cover: File No. 19006. Court of Claims. Term No. 355. Wesley E. Travis, appellant, *vs.* The United States. Filed July 10th, 1903.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 84.

WESLEY E. TRAVIS, APPELLANT,

vs.

THE UNITED STATES.

BRIEF ON BEHALF OF APPELLANT.

STATEMENT OF CASE.

The *facts* in this case are few and simple, and, briefly, are:

1. September 15, 1896, appellee advertised for proposals for transporting the mails on route No. 404,011 at Boston, Mass., for the term July 1, 1897, to June 30, 1901, being the covered screen-wagon mail station service; appellant submitted proposal to perform the service for the period named for the sum of $3,780 per annum; his bid was accepted by appellee, award of contract made to him December 21, 1896, and contract in writing, dated on said last-named day, was entered into between the parties, with sureties, for the performance of the service during the period aforesaid, and the contract was duly approved and accepted by appellee (*R.*, *3-4*).

2. Appellant made all necessary arrangements preparatory to the performance of the service, and, in that behalf, expended the sum of $500; and he was at all times able, ready,

and willing to perform the service under the contract, and so repeatedly tendered himself to appellee, but was by it prevented from performing (*R.*, *8*).

3. The service under the contract covered 28,886 miles per annum, but before the date upon which, under the contract, appellant was to commence the performance of service, appellee, in order to expedite the mails, determined to dispatch certain thereof upon the electric street cars, instead of upon the wagons, and thus *decreased* the service so that it embraced but 23,088 miles per annum—

> "being a decrease merely in the quantity and volume of service required to be performed of 5,798 miles per annum, or a decrease of 20 per cent. from the annual mileage embraced in and called for by the said advertisement" (*R.*, *8*, *14*).

4. Thereupon, and because of said decrease in quantity and volume of service required, and not because of any neglect or default of appellant in the performance thereof, appellee undertook to discontinue the contract aforesaid, under the alleged authority of the contract itself, in that regard; and, thereafter, re-advertised and relet the same service, so decreased, as above, and covering the same period, to another contractor, for the sum of $2,475, per annum (*R*, *8*, *14*).

5. The difference between the amount it would have cost appellant to perform the service and the contract price therefor, during the contract period, is the sum of $5,500 (*R.*, *9*).

6. Appellant filed petition and suit in the Court of Claims, based upon the foregoing *facts*, which were proven, and, thereafter, found by that court; and said petition was dismissed, upon the ground that the arbitrary action of defendant was reserved to it as a right and privilege under the contract.

7. From that judgment, the present appeal was taken.

ASSIGNMENT OF ERRORS.

The court below *erred:*

1. In holding that the Postmaster General had, under the facts found, the legal right to terminate and discontinue the contract of appellant.

2. In failing to enter judgment for appellant in the sum of $5,500, being the amount of loss sustained by him by reason of the breach of contract by appellee.

3. In dismissing the petition of appellant, and entering judgment in favor of appellee.

BRIEF.

I.

THE CONTRACT PROVISIONS ARE TO BE TESTED AND APPLIED BY THE SAME RULES OF LAW, AND GOVERNED BY THE SAME DECISIONS, AS IF ENTERED INTO BETWEEN INDIVIDUALS.

This case presents for determination the single question whether, under the above facts, the Postmaster General had the right to arbitrarily discontinue the contract.

In order to properly determine that question, it will be useful to first consider the relative rights of the contracting parties.

The contract is to be tested by precisely the same rules of law, and governed by the same decisions, as if it had been entered into between individuals. No special privileges and rights are conferred by law in favor of one party to such contract simply because that one party happens to be the Government. This principle has been frequently affirmed.

For example, in the case of Gilbert (*1 Ct. Cls., 28, 37*), speaking of the reciprocal rights and obligations in the case of contracts between an individual and the Government, it was stated:

> "We can see no good reason for adopting any different rule in regard to these contracts, to which the United States is a party, than is applied to those between man and man."

In the case of Curtis (*2 id., 144, 152*), the opinion states:

> "The rule and principles adopted by this court for the administration of justice between a claimant and the Government is simply to give that measure of relief which the law would award were the action between man and man. The court never gives greater

> and never gives discretionary relief. * * * But the liability of the Government in these cases on contract, express or implied, has been held, generally, to be simply that which a claimant might pursue against another defendant in another tribunal."

The same thing was reaffirmed in the case of Brooke (*id., 180–184*).

Again, in the case of Southern Pacific Railroad Co. (*28 id., 77, 105*), it is thus stated in the opinion :

> "We understand the law to be that, 'when a government enters into a contract with an individual, 'it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of 'a legislator for that of a moral agent, with the same 'rights and obligations as an individual,' (3 Hamilton's Works, 518; U. S. *v.* Bank of Metropolis, 15 Pet., 392; Deming *v.* United States, 1 C. Cls. R., 191). If there are exceptions to the rule just stated, they do not apply to this action."

So, also, in the case of Starin (*31 id., 65, 85*), the court reaffirmed the same doctrine (citing Hull *vs.* Wisconsin, *103 U. S., 5*, and Davis *vs.* Gray, *16 Wall., 203*).

See, also, same thing in the case of Smoot (*15 Wall., 36*).

And in the case of Railway Co. *vs.* United States (*104 U. S., 680, 685*), this court expressly affirmed the doctrine, where in respect of a mail contract, it stated :

> "The contracts * * * were expressly authorized by law. They were, therefore, valid and binding on the United States as well as upon the railroad company. * * * The United States would have been liable to damages for its breach, on the same principles and to the same extent as a private party, for which a suitable remedy was provided by law in the jurisdiction conferred upon the Court of Claims. In this respect, the relation between the parties was that of perfect equality in right."

Without further citation of authority, it may be said to be settled beyond question that the same principles must be applied in this case as would be applied had the contract been entered into between individuals.

Therefore, the only rights reserved to appellee, and upon which it may rely in respect of the enforcement or attempted discontinuance of the contract, must be found, if at all, in the contract itself, or in the law governing the same.

In this connection, it may be remarked, in passing, that the only exception to the rule above stated is in respect of contracts entered into by the United States, by and through its agents, in the absence of lawful authority; and, in such cases, it is held that the United States is not bound by the ordinary rules of agency:

McElrath (*12 Ct. Cl., 201, 216*).
Whiteside (*93 U. S., 247*).
Pine River Logging Co. (*186 id., 279, 291*).

Here the contract was entered into in pursuance of lawful authority, and the only question involved is as to the relative rights of the contracting parties, as found in the contract itself, or in the law governing it.

II.

PROVISIONS OF THE CONTRACT.

Before considering specifically the exact provisions of the contract, as well the law properly applicable thereto, it must be borne in mind that the contract absolutely required appellant to perform the certain mail service therein referred to, for the compensation therein fixed, and for the full term of four years.

The position of appellee, sustained by the court below, is, that while appellant's obligation to perform was absolute,

appellee was bound only to the extent and for such period as suited its sovereign will and pleasure.

If that contention be sound, then there is presented the most extraordinary and unusual condition of a contract absolutely binding and *obligatory* upon the one party for the full term thereof; and yet *discretionary* as to the other, the right being reserved to such other to arbitrarily terminate the contract at any time during its term.

Such an one-sided agreement is so utterly repugnant to the fundamental theory of contracts that the right so asserted must be found, if at all, in the contract itself, since no such right or privilege will be presumed or inferred in favor of one party to an agreement, while the other party thereto remains bound. That no such reservation or right is contained in the contract is apparent from a mere reading thereof.

The "Instructions to bidders," accompanying the "Advertisement for proposals" (and by reference made part of the contract), contained the following provision:

> "There will be no diminution of compensation for partial discontinuance of service, or increase of compensation for new, additional, or changed service that may be ordered during the contract term; but the Postmaster General may discontinue the entire service on any route whenever the public interest, in his judgment, shall require such discontinuance, he allowing, as full indemnity to the contractor, one month's extra pay" (*R.*, *14*).

The contract obligated the contractor to carry the mails, during the period named, in covered screen wagons, for the service covered by the advertisement for proposals, and

> "for all new or additional service of said kind which may, at any time during the term of this contract, be required in said city, at $3,780 per year" (*R.*, *5*).

The contract contained the following, further, provisions:

> "*Tenth.* To perform all new or additional or changed covered screen wagon mail station service that the Postmaster General may order at the city of Boston, Mass., during the contract term, without additional compensation, whether caused by change of location of post-office, stations, landing, or the establishment of others than those existing at the date hereof, or rendered necessary, in the judgment of the Postmaster General, for any cause, and to furnish such advance wagons or extra wagons from time to time for special or advance trips as the Postmaster General may require, as a part of such new or additional service.
>
> * * * * * * *
>
> "It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster General may change the schedule and termini of the route, vary the routes, increase, decrease, or extend the service thereon, without change of pay; and that the Postmaster General may discontinue the entire service whenever the public interest, in his judgment, shall require such discontinuance; but for a total discontinuance of service the contractor shall be allowed one month's extra pay as full indemnity" (*R.*, *6–7*).

It further provided that the contract might be *annulled*, for certain reasons specifically enumerated (*R.*, *7*); but those provisions are here unimportant, inasmuch as the fact is, and the court below so found, that the "order to discontinue "said service under claimant's contract was not made on ac- "count of any neglect or default" on his part (*R.*, *8–9*).

III.

THE ACTION OF THE GOVERNMENT IN THIS CASE CONSTITUTED A BREACH OF ITS CONTRACT WITH APPELLANT.

As above shown, the contract absolutely bound the contractor to perform, without additional compensation, all such new, additional, or changed, increased or extended, service as might be required of him during the contract term; and, on the other hand, it bound the United States to pay to the contractor the agreed rate of compensation, even should the service be decreased during the contract term.

Thus, according to the very letter of the contract, both parties were placed on an equal footing, and each took the risk and chance of a change in the amount of service required, be it an increase or a decrease, during the entire term, without any change in the amount of compensation to be paid by the one and received by the other.

The wording of the contract is so exceedingly plain and free from all ambiguity that it would hardly seem to admit of serious argument in support of a contention so utterly in defiance of and in direct conflict with its said provisions, as one that seeks to impose upon the contractor the obligation to perform the service, even if increased or extended, without additional compensation; and yet permits the United States to break the contract because the volume of service happens to be decreased, and some other contractor is willing to perform the decreased service at a lower price.

How can it be possible, under this contract, to hold the contractor to a performance of a 20 per cent. *increase* of service, without increase of pay, and yet, at the same time, relieve the United States of its contract obligation simply because the required service was *decreased* 20 per cent.?

Had the conditions been reversed and the mail service *increased* 20 per cent., instead of decreased 20 per cent., can

there be any question that the contractor would have been compelled to perform the increased service without additional compensation?

Clearly not; no such contention is asserted by either party to this suit; and, if it were, it would be utterly untenable, not only under the express provisions of the contract, but under the repeated decisions of the lower court, in other cases involving similar contracts for carrying the mails, containing the identical provisions hereinabove quoted.

Otis (*20 Ct. Cl., 315, 328;* S. C., affirmed, *120 U. S., 115*).
Knox, ex'r (*30 Ct. Cl., 59, 76–7*).
Woolverton (*34 id., 247, 268–9*).
Union Transfer Co. (*36 id., 216, 227*).
Slavens (*38 id., 547, 586*).

The contract fully covered the contingency of increase or decrease in quantity and volume of service, the compensation, in either case, to remain unchanged.

If, notwithstanding the express provisions of the contract, the United States is permitted to arbitrarily terminate its obligation and agreement, simply because the service has been decreased 20 per cent. and it wishes to avail itself of a saving to that extent, in the compensation fixed by the contract; does it not logically lead to the conclusion and result that the United States, in the same way, and for the same purpose, could relieve itself of any similar contract where there had been no decrease in service, but some other mail contractor is willing to perform the contract service at a lower rate of compensation?

This is clearly indicated in the opinion of the court below rendered in the Slavens case, (*supra,*) and, without repetition, adopted as its opinion in this case, (the two cases having been consolidated and tried together,) wherein it is stated:

> "The service had been rightfully decreased, under the stipulations of the contracts, until the services remaining to be performed were not reasonably worth

> the original contract rate, and to have continued its payment would have been contrary to public interests, and while claimant was under no obligation to continue in the service at a reduced rate, the head of the department was obligated, as well by the duties of his high office as the provisions of the contract, to subserve the public interests in taking care that no unreasonable compensation was paid for the services actually performed" (*R., 11*).

The contract, in unambiguous and explicit terms, fixed the obligations of each party; the contractor expended $500 in preparing his equipment for the performance of the work; he was, at all times, able, ready, and willing to perform the service, and so repeatedly tendered himself to appellee, but was by it prevented from such performance, not because of any neglect or default on the part of the contractor, but because the service was decreased 20 per cent. in quantity and volume.

The duty of the Postmaster General was fully discharged and performed, and the public interests were properly subserved in taking care that no unreasonable compensation was paid, when the contract was awarded to appellant as the lowest bidder. The terms and provisions of the contract fully safeguarded the interests of the government, giving to it the full benefit of all new, additional, or changed, increased or extended, mail service without any additional compensation.

The history of the Post-Office Department, even as disclosed in the comparatively few suits that have been brought in the Court of Claims, growing out of the transportation of mails in the cities of the United States, establishes the fact that mail service steadily *increases* in volume, instead of decreases; and that the provision requiring the contractor to perform such increase without additional compensation is a most liberal and valuable right reserved to the government, and, ofttimes, a most grievous burden upon the contractor.

Nevertheless, that is the obligation, and the government is entitled to strict and full performance by the contractor, regardless of the extent and burden of the increase.

Why, then, is the contractor not entitled to the enforcement of the like provision and right reserved in the contract in his favor, namely, decrease of service without decrease of compensation?

Of the two, that contingency was, as above shown, the most improbable and least likely to happen; the only reason it happened in this case was, that, at or about said period, the Post-Office Department was inaugurating a mail service upon electric street car lines in various cities, in order to expedite city mail dispatches; and, having entered into contract with appellant, upon the faith of which he expended $500 in preparing himself to perform the contract service, appellee concluded to try the experiment in Boston; and this reduced appellant's contract mileage 20 per cent. per annum.

The government then simply took away his contract, and re-let the remaining 80 per cent. service to another, at a lower price.

If appellee saw fit, during the contract term, to *decrease* the amount of service required, whether by the curtailment or partial discontinuance thereof, or by adopting, for a part of the service, some other kind of a mail messenger—for example, an electric street railway line—that was its privilege; but, as the contract expressly stipulated that such decrease in amount of service required should not change or reduce his pay, the contractor was entitled to all benefit and profits, if any, that would result from such decrease in the service required.

As was stated by this court in the case of Railway Company *vs.* United States (*104 U. S., 680, 684, supra*):

> "The government, whatever power it may reserve over its own agreements, cannot impose new contracts upon those with whom it deals."

The appellant had a right to rely upon the terms and provisions of the contract, according to the natural and ordinary meaning of the words used; and he had a right to assume that the covenant to pay a fixed rate of compensation per annum, for the contract period, unaffected by either an increase or decrease in quantity and volume of service required, was equally binding upon the government as upon himself, and that that covenant to pay meant just exactly what it said, nothing more and nothing less.

The government, however, here seeks to create and impose a new contract upon appellant, after breach on its part, by seeking to inject into the contract an extraordinary condition that not only finds no support from anything contained in the contract, but one that is absolutely inconsistent with and repugnant to the contract.

IV.

THE CONTENTION OF THE GOVERNMENT IS UNTENABLE IN LAW.

In defense of its action in this case, the government contends:

(*a*.) That, under section 161, R. S. U. S., the Postmaster General is authorized to make regulations, not inconsistent with law, for the conduct of his Department and its business; and that, therefore, the present contract is, by necessary implication, subject to all regulations so made, in so far as not in conflict with the express provisions of the contract itself.

(*b*.) That, in pursuance of the above authority, the Postmaster General made the following regulation, being section 817 of the Postal Laws and Regulations of 1887 (in force at the time of the making of this contract):

> "The Postmaster General may discontinue or curtail the service on any route, in whole or in part, in

order to place on the route superior service, or whenever the public interests, in his judgment, shall require such discontinuance or curtailment for any other cause; he allowing, as full indemnity to the contractor, one month's extra pay on the amount of service dispensed with, and a *pro rata* compensation for the amount of service retained and continued."

(*c.*) That said regulation, (quoted,) authorized the action of the Postmaster General herein.

(*d.*) That the contract contains provisions authorizing its summary discontinuance; and, further, that the contract is, in terms, made subject to all conditions imposed by law and the several acts of Congress relating to post-offices and post-roads.

(*e.*) That the right to so discontinue the contract has been affirmed by this court, (Garfielde *vs.* United States, *93 U. S., 242*; Railway Co. *vs.* United States, *104 id., 680*;) and, also, affirmed in an opinion by Attorney General Garland, (*19 Ops. A. G., 146*).

Replying to said several propositions, in the order above stated:

(*a.*)

It may be admitted that, under section 161, R. S. U. S., the Postmaster General may make all proper and needful regulations, not inconsistent with law, for the conduct of the business of his Department.

Such reserved power, however, does not authorize or permit the government to discontinue or terminate its contract obligations, where such action is in conflict with the express provisions of the contract itself; nor does it authorize a contract to be interpreted in the light of one section of the postal laws and regulations, as authority for the discontinuance

of the contract, when that section is absolutely repugnant to and inconsistent with the express terms of the contract itself.

(*b.*)

In order to a full understanding of the provisions of the Postal Laws and Regulations of 1887, section 817 of which is claimed by appellee to be determinative of this controversy, and, by necessary implication, or by reference in general terms, to have been incorporated in the contract itself; it may be useful to refer to sections 808, 813, and 817, of those laws and regulations.

Those sections are, as follows:

> "SEC. 808. For what causes contracts may be annulled.
>
> "The Postmaster General may annul a contract for the following delinquencies on the part of the contractor:"

(*Note.*—This section refers only to annulment of contract for failures, delinquencies, etc., and is, therefore, inapplicable to the facts in this case.)

> "SEC. 813. Increase of compensation for increased service.—Compensation for additional service in carrying the mail shall not be in excess of the exact proportion which the original compensation bears to the original service, and when any such additional service is ordered the sum to be allowed therefor shall be expressed in the order, and entered upon the books of the Department; and no compensation shall be paid for any additional regular service rendered before the issuing of such order (*R. S., sec. 3960*).
>
> "SEC. 817. Decreased compensation for decreased service.—The Postmaster General may discontinue or curtail the service on any route, in whole or in part, in order to place on the route superior service, or whenever the public interests, in his judgment, shall require such discontinuance or curtailment for any

other cause; he allowing, as full indemnity to the contractor, one month's extra pay on the amount of services dispensed with and a *pro rata* compensation for the amount of services retained and continued."

(*c.*)

Said section 817 manifestly did not authorize the action of the Postmaster General in this case.

The above sections, (quoted,) it will be observed, provided specifically the causes for which a contract may be annulled, (*Sec. 808*); further, that an *increased* compensation should be paid for an increased service, the increased compensation, however, to be in the exact proportion which the original compensation bore to the original service, (*Sec. 813*); and, further, that the Postmaster General may discontinue or curtail the service on any route, *in whole or in part*, whenever the public interests, *in his judgment*, require such discontinuance or curtailment; in which case one month's extra pay shall be allowed the contractor as full indemnity for the amount of service dispensed with, and a *pro rata* compensation for the amount of service retained and continued, (*Sec. 817*).

It is thus seen that, under the above regulations, the Postmaster General undertook to specifically provide for the carriage of mails under contract, the compensation for which could be increased or decreased (*pro rata*) accordingly as the service increased or decreased; with the further right reserved to discontinue or curtail the service, in whole or in part, and to *pro-rate* the compensation accordingly.

So far as a contract may have been made with direct reference to such regulations, and incorporating in the contract itself such reserved right (as was, in fact, done in the cases below referred to, under sub-paragraph *e*,) there would seem to be no legal objection to giving full effect to the provision; but as will below be shown, no such right was reserved in this case, either by law, regulation, or contract; but, on the

contrary, an entirely different scheme and plan was contemplated, intended, and required from that set forth in the above postal regulations, as will be presently shown.

But it must be remembered that the sections of the Postal Laws and Regulations referred to are, in terms, directed to the transportation of mails by railroad, steamboat, and star routes, where, because of the fact that the compensation is fixed upon a mileage basis, (as in the case of Chicago, etc., Ry. Co. *vs.* United States, *supra*, where the fixed price per annum was at the rate of a specified sum per mile,) an adjustment of compensation may be readily estimated upon a mileage basis and prorated according to the increase or decrease in the mileage.

This contract is one relating to a covered screen wagon mail messenger, transfer, and mail station service, in the city of Boston; and said sections of the Postal Laws and Regulations do not even profess to have any relation thereto.

The service under a contract covering mail messenger, transfer, and mail station service (to which class the present contract belongs), is essentially different from a railroad, steamboat, or star-route service, which as shown is placed and estimated upon a mileage basis, and an increase or decrease in mileage prorated. Here however, as in other wagon mail messenger, transfer, and mail station service, the contract requires the performance, without additional compensation, of all new or additional or changed covered screen wagon mail station service that may be ordered of him during the contract term, whether caused by change of location of post-offices, stations, landing, or the establishment of others than those existing at the date of the contract, or rendered necessary, in the judgment of the Postmaster General, for any cause, and to furnish advance or extra wagons for special or advance trips; that schedules may be changed, as well the termini of the route, and that routes may be varied, increased, decreased, or extended without change of pay.

Thus the wagon mail messenger service in a city is of an essentially different kind from that of a railroad, steamboat, or star-route service; the two are not governed by the same sections of the Postal Laws and Regulations; and the contract requirements of each said service are necessarily distinctly different.

This, of course, entirely accounts for the radical difference between the scheme and plan of a railroad, steamboat, and star-route service and contract, which permits a re-adjustment and prorating of compensation, and the present contract for a covered screen wagon mail messenger, transfer, and mail station service, which contains a fixed rate of compensation, permitting of no change either way, for either increase or decrease.

(*d.*)

The contract contains no provisions which in any way permitted or authorized its summary termination.

It must be borne in mind that the regulations above quoted are not found in any act of Congress authorizing the making of contracts for carrying the mails, and providing various of the detail matters in connection therewith. The supposed right here asserted by appellee cannot be found in the statutes; it cannot be found in any postal regulations having any application to this contract; and it cannot be found in the contract itself.

The "Instructions to bidders," accompanying the advertisement for proposals, and under which appellant submitted his bid and proposal, contained no reference whatever to the above regulations; but, on the contrary, appellant, as a prospective bidder, was therein and thereby notified that an entirely different scheme and plan was contemplated, intended, and required from that set forth in said postal regulations, and one too that was infinitely more onerous and burdensome to the contractor than under the former plan,

namely, that here there should be no increase or decrease of compensation, *pro rata* or otherwise, for either increase or decrease of service; and, instead of providing for a discontinuance or curtailment of service, *in whole or in part*, (as in said postal regulations, *supra*,) it provided only for a *total* discontinuance.

A reading of said "Instructions to bidders," in this regard, leaves no room for doubt:

> "There will be no diminution of compensation for partial discontinuance of service or increase of compensation for new, additional, or changed service that may be ordered during the contract term; but the Postmaster General may discontinue the entire service on any route whenever the public interests, in his judgment, shall require such discontinuance, he allowing, as full indemnity to the contractor, one month's extra pay" (*R.*, *14*).

And, again, the contract itself expressly stated the covenant and agreement between the parties in this regard:

> "It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster General may change the schedule and termini of the route, vary the routes, increase, decrease, or extend the service thereon, without change of pay; and that the Postmaster General may discontinue the entire service whenever the public interest, in his judgment, shall require such discontinuance; but for a total discontinuance of service the contractor shall be allowed one month's extra pay as full indemnity" (*R.*, *7*).

This, it will be observed, was an entirely different plan from, as well utterly inconsistent with, that which was formerly provided for by the postal regulations; there a sliding scale of compensation was provided, as the service either increased or decreased, and authorized a discontinuance or curtailment of service, *in whole or in part*, and a readjusted *pro rata* com-

pensation; whereas, here, those provisions were entirely abandoned, and the parties mutually undertook to perform, on the one hand, and to pay, on the other, *all* the service, be it greater or less, *without any change of pay;* and further, only authorized a discontinuance of service when it was *total.* A change either way was to be absolutely without change of pay, and the only right reserved to the Postmaster General, as to the termination of the contract during the term of its existence was for the *total* discontinuance of the *service.*

Hence, it necessarily follows that neither of the above, nor any other, sections of the postal laws and regulations has, nor can have, any application whatever to this contract.

Furthermore, the action herein complained of finds no support in the provision contained in the contract—

> "and that the Postmaster General may discontinue the *entire service* whenever the public interest, in his judgment, shall require such discontinuance; but, *for a total discontinuance of service,* the contractor shall be allowed one month's extra pay as full indemnity" (*R.*, 7).

To say that the expressions "may discontinue the entire service," and "a total discontinuance of service," are the legal equivalents of a discontinuance of the *contract* itself, is not only to place it in the power of the Postmaster General to abrogate, at will, any such existing contract, and thus convert it into an unilateral agreement, binding alone on the contractor, and only optional and discretionary with the Postmaster General; but such holding would be utterly at defiance with, as well ignore, the express and solemn covenant, binding alike on both parties, that mere increase or decrease in quantity and volume of service should not affect or change the compensation fixed by the contract.

Here there was, in fact, no discontinuance of service, entire or otherwise, but only a partial *decrease* of service, to wit, 20 per cent. per annum; and that part of the service,

was simply transferred from a screen-wagon mail messenger to an electric street car mail messenger.

The extraordinary right asserted by appellee in this case finds no support in the decisions of the lower court or of this court, in other cases:

Thus, in the case of Stevens, (*2 C. Cl., 95, 103*), the Secretary of War undertook to require the acceptance, by a contractor, of a less sum of money than the contract price, but he declined so to do; and it was held:

> "This unilateral action of the Secretary of War is not obligatory upon the claimant, and he should nevertheless recover the full amount of his voucher."

So, also, in the case of Mason (*6 id., 57*), the Secretary of War undertook to require the contractor to accept a modification of his contract, in the matter of compensation, or else to renounce the contract. The contractor elected to accept the former alternative, and, accordingly, permitted a modification of the agreement. He afterwards, however, endeavored to enforce, by suit in the Court of Claims, his contract rights as to compensation; and that court, while recognizing and sustaining his right to have stood upon his legal rights, as in the Stevens case (*supra*), yet, having elected to modify his agreement, and having accepted that modification, he was bound by such election.

Again, in the case of Railway Co. *vs.* United States (*104 U. S., 680, 685*), it was held, in respect of a contract with the government for carrying the mails, that it can only be annulled, discontinued, or lessened, as provided in the contract itself, and can be changed in no other way, "except by the mutual assent of the parties."

(*c.*)

And, finally, appellee contends that the right asserted and exercised herein by the Postmaster General finds support in the decisions of this court (Garfielde *vs.* United States, *93 U. S.*,

249, and Railway Co. *vs.* United States, *104 U. S., 680*), and in an opinion of Attorney General Garland (*19 Ops. A. G., 147–8*).

(1.) The Garfielde case.

In that case, claimant had submitted a formal proposal and bid for conveying the United States mail, by steamboat, between Port Townsend, Washington, and Sitka, Alaska; his proposal was made expressly subject to the laws and instructions attached to the advertisement of mail service. Among such instructions and regulations, was section 263, relating to mail transportation on steamboat and star routes (as it was designated prior to the revision of 1887, but being precisely the same regulation designated in the revision of 1887 as section 817). It will not be necessary to here quote said section 263, it having been already quoted above, as section 817.

Said claimant's bid was accepted, but, before any formal written contract had been signed by the parties, the acceptance thereof was revoked; and he, thereafter, brought suit in the Court of Claims, to recover loss of profits sustained by breach of contract.

That court, however, held, that no valid contract existed, because claimant's proposal did not strictly follow the service advertised:

> "The Postmaster General, having erred in accepting the bid of the claimant, had a right and it was his duty to correct his error. His act in accepting the claimant's bid was in violation of law, and of no force and effect, and the petitioner acquired no rights thereby.
>
> "The judgment of the court is that the petition be dismissed" (*11 C. Cl., 592, 605*).

The decision of the lower court, in that case, did not pass upon the question of the right of the Postmaster General to arbitrarily terminate the contract.

On appeal, this court held that, under said facts, a contract existed, but it sustained the right and power to so terminate the contract, because of said section 263 (*section 817, supra*), which was made and held to be a part of the contract itself.

In the opinion, this court stated :

> " The claimant states, in his proposal, that he has full knowledge of the laws and regulations of the Department on the subject of mail transportation. He no doubt knew that this regulation provided that the Postmaster General could discontinue entirely the service for which he proposed, whenever, in his judgment, the public interests required it, and that, for such discontinuance, one month's pay was to be deemed a full indemnity to the contractor " (*p. 246.*)

That case, therefore, turned upon the express contract provision of section 263, authorizing a discontinuance or curtailment of service, in whole or in part, and the *pro-rating* of compensation; but, as has been above shown, that section has application only to transportation on steamboats and star routes, where the service can be readily estimated upon a mileage basis, and pro-rated according to an increase or decrease in the mileage.

Such a service is totally different in every essential and particular from the covered screen wagon mail station service in a city, like that here under consideration.

And, furthermore, the express provisions of this contract make absolutely impossible the re-adjustment of compensation upon a *pro-rata* basis, increase or decrease.

In the Garfielde case, there was involved the scheme or plan of a re-adjusted compensation, upon a pro-rated mileage basis, in the proportion of the mileage increased or decreased; whereas, in the present case, there is involved the entirely different scheme or plan of a definite and fixed compensation that may be neither changed nor pro-rated for any increase or decrease of service.

The decision in that case, therefore, is not here controlling.

(2.) The Chicago and Northwestern Railway Co. case.

That case involved a contract for transporting the mail on a railroad, for a period named, and at a fixed price per annum, being at the rate of a specified sum per mile. The contract contained the same section 263 (section 817, *supra*), as in the Garfielde case.

Thereafter, an act of Congress undertook to authorize the Postmaster General to re-adjust the compensation to be paid for transportation of mails on railroad routes; and, accordingly, such re-adjustment was attempted by a reduction from the rate fixed in the contract, but the company declined to submit thereto, and brought suit to recover the unpaid amount.

This court, while sustaining the right of the Postmaster General to re-adjust and pro-rate compensation, for an increased or decreased mileage, where the contract contains a provision of that kind (as it there did), and where the service was based upon that scheme and plan (as it there was), proceeds to state the law applicable to the relative rights of the parties to such mail contracts, as follows:

> "The power to establish the price included the power also to declare the period of its duration; and if it be said that any contract which fixes both the price and its duration must be construed as subject to the continuous control of the power which made it, it must also be admitted that no change can be made without the abrogation of the contract. The government, whatever power it may reserve over its own agreement, cannot impose new contracts upon those with whom it deals. * * * It certainly cannot retain the obligation of the contract as against the company, and, at the same time, vary its own, unless it has reserved the right to do so in the contract itself.
>
> * * * * * * *

> "They (the contracts) were, therefore, valid and binding on the United States as well as upon the railroad company. They contained, within themselves, the mode for lessening, or, if deemed best, for discontinuing entirely, the described service; and provided for a proportionate reduction of the stipulated compensation. In no other mode could the contract be changed, except by the mutual assent of the parties. Any attempted change by either, otherwise, would have been merely a breach of the agreement; and the United States would have been liable to damages for its breach, on the same principles and to the same extent as a private party, for which a suitable remedy was provided by law in the jurisdiction conferred upon the Court of Claims. In this respect, the relation between the parties was that of perfect equality in right" (*pp. 684–5*).

It was, however, held that the government had no right to change the contract, and impose upon the contractor the performance of the service at a compensation other than that fixed in the contract; and that such contract could only be annulled, discontinued, or lessened, as therein provided, and can be changed in no other way, "except by the mutual assent of the parties."

That case, therefore, instead of supporting the contention of appellee, really establishes the unsoundness thereof; and, furthermore, as above shown, the contract there under consideration was an entirely different contract from the present.

3. The opinion of Attorney General Garland.

In that case, the contract under consideration embodied the very words of said section 817 (*supra*), and, in addition, used the words that the Postmaster General might discontinue or extend the *contract* (using said word contract, instead of limiting the right reserved to the *service* merely).

In the opinion, the Attorney General comments upon the substitution, in the contract itself, of the word "contract"

for the word "service;" and concludes that the right so reserved to the Postmaster General, as contained in the contract, could be lawfully exercised by discontinuing the "contract" during its term. In support of his opinion he cites the Garfielde case (*supra*).

The above considerations dispose of the cases urged in support of the position of appellee; the decision in each said case being based upon the fact that the regulation and authority, conferred by said section 817, was found in and expressly made a part and condition of the very contract itself.

Here, no such regulation was made a part of the contract, either by implication, reference, expression, or otherwise. On the contrary, the regulation is so utterly inconsistent and at variance with the conditions of the contract that the two cannot possibly stand together.

How can a regulation (section 817) authorizing a re-adjustment of compensation upon a *pro-rata* basis, for an increased or decreased mileage, consist with the express provision of this contract that the compensation shall be neither increased, diminished, nor changed, for an increase or decrease in service?

It is utterly impossible to apply section 817 to this contract.

Therefore, if the compensation may not be changed because of an increase or decrease of mileage, surely the contractor may not lawfully be deprived of his contract and of *all* compensation because of such decrease.

V.

THE JUDGMENT BELOW IS ERRONEOUS AND SHOULD BE REVERSED.

From what has now been shown, it results that the action of the Postmaster General, herein complained of, was without lawful authority or right, and constituted a breach of contract, for which the government is answerable to appellant.

The loss sustained by appellant by reason of the breach, as found by the court below, is $5,500 (*R.*, *9*), and for that sum he is entitled to judgment.

It is respectfully submitted that the judgment below should be *reversed*, and that judgment should be directed to be entered in favor of appellant, and against appellee, in the sum of $5,500.

A. A. HOEHLING, JR.,
Attorney for Appellant.

WASHINGTON, D. C.,
November 19, 1904.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

WESLEY E. TRAVIS, APPELLANT,
v.
THE UNITED STATES. } No. 84.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

On September 15, 1896, the Postmaster-General of the United States advertised for proposals for transporting the mails in various cities of the United States, and, among others, on route No. 404011, being the covered screen wagon mail-station service at Boston, Mass., for the term from July 1, 1897, to June 30, 1901. (Rec., p. 3.) Accompanying this advertisement for proposals were detailed instructions to bidders as to the manner and character of the proposed service and contract, which instructions contained the following:

> There will be no diminution of compensation for partial discontinuance of service or increase of compensation for new, additional, or changed

> service that may be ordered during the contract term; but the Postmaster-General may discontinue the entire service on any route whenever the public interests in his judgment shall require such discontinuance, he allowing, as full indemnity to the contractor, one month's extra pay. (Rec., pp. 4, 14.)

In pursuance of this advertisement and the stipulation above stated and therein contained, the claimant made and filed with the Post-Office Department a proposal for the performance of said service for the period named for the sum of $3,780 per annum. This proposal stated that the claimant proposed to carry the mails—

> under the advertisement of the Postmaster-General, dated September 15, 1896, and subject to all the requirements and conditions contained therein, etc.

and further that—

> This proposal is made after due inquiry into and with full knowledge of all the particulars in reference to the service; and also after careful examination of the conditions attached to said advertisement and with intent to be governed thereby. (Rec., pp. 3, 4.)

The claimant's proposal was duly accepted by the Department, the contract duly awarded to him, and thereupon a contract, in writing, was entered into December 21, 1896, between the defendants and claimant for the performance of the service during the period named above. (Rec., pp. 4, 5, 6, 7, 8.) This contract

referred to the advertisement above named and by express statement made it a part of itself (Rec., p. 5), and further contained the following stipulation as to the power and right of the Postmaster-General to discontinue the service:

> It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster-General may change the schedule and termini of the route, vary the routes, increase, decrease, or extend the service thereon, without change of pay; and that the Postmaster-General may discontinue the entire service whenever the public interest, in his judgment, shall require such discontinuance; but for a total discontinuance of service the contractor shall be allowed one month's extra pay as full indemnity. (Rec., p. 7.)

The contract further stipulated that—

> This contract is further to be subject to all the conditions imposed by law and the several acts of Congress relating to post-offices and post-roads. (Rec., p. 8.)

The claimant thereupon made the necessary preliminary arrangements preparatory to the performance of the service under his contract and therein expended $500, and was able and willing to perform but was prevented by defendants in the manner and for the reason below stated. (Rec., p. 8.)

Before the date upon which the claimant was to commence the performance of said service under the terms of the contract the Postmaster-General determined to

dispatch certain mails upon the electric street cars, instead of by the wagon service contracted for, thereby expediting the dispatch of the mails. The service under the contract covered 28,886 miles of travel per annum, but, by reason of this change made by the Postmaster-General, the annual miles of travel which would have been left to be performed under the contract was but 23,088 miles—a decrease in the quantity and volume of service required to be performed of 5,798 miles per annum, or 20 per cent, from the annual mileage embraced and called for by the advertisement. (Rec., pp. 8, 14.)

By reason of this change, by which the Postmaster-General was enabled to expedite the dispatch of mails by other means, above referred to, than those provided in the contract with claimant, the Postmaster-General, by order of April 27, 1897, discontinued the service of claimant, as follows:

> Discontinue service, to take effect July 1, 1897, and allow contractor one month's extra pay. (Rec., p. 8.)

The United States thereupon entered into another contract with another person, at the rate of $2,475 per annum, for the same contract period for the service not changed to street-car service. (Rec., p. 8.) This new contract was made after public advertisement, as required by law, of which the claimant in this case had full notice and on which he could have bid had he desired to do so, but he did not. (Rec., p. 14.)

The difference between the amount it would have

cost claimant to have performed the service and the amount he would have received therefor is $5,500.

Claimant brought suit in the Court of Claims to recover damages for the action of the Postmaster-General in discontinuing the service under his contract, and the court dismissed the petition upon the ground that the contract gave the Postmaster-General the right to discontinue the service whenever the public interest in his judgment should require such discontinuance, the claimant in such case to be allowed one month's extra pay as full indemnity; and that the Postmaster-General rightly discontinued the service under claimant's contract to subserve the public interest in taking care that no unreasonable compensation was paid for the service actually performed.

From this judgment the present appeal was taken by the claimant.

ARGUMENT.

Termination of the contracts for which action claim for damages is made.

The question involved arises upon the claim for damages for an alleged breach of contract on the part of the United States through the Postmaster-General, in discontinuing the service under the claimant's contract.

The facts as to the action of the Postmaster-General in this regard are fully set forth in the statement. In the proper exercise of discretion reposed in him, the Postmaster-General has established improved mail service by dispatch of certain mails upon the electric

street cars, instead of by wagon service as contracted for with the claimant. This action decreased the quantity and volume of service which was required to be performed under claimant's contract 20 per cent of the annual mileage, thus relieving him of the performance of a large amount of service stipulated for in the advertisement.

Wagon service in cities such as that for which complainant contracted is always subject to constant change as to the amount of service, the weights of mails, and increase or decrease in mileage which will be required thereunder; consequently it has long been customary to provide that these changes in requirements shall be without change of pay, and the claimant's contract provided, therefore, that there should be no diminution of compensation for partial discontinuance of service. Consequently, if this contract were to be continued the United States would continue to pay him for the large amount of service which he was not performing and for which defendants were paying others.

But while it is true that this contract provided in this manner for the mutations in the service, which provision would undoubtedly govern so long as the contract was allowed to remain in force, yet there was another provision in the same clause which gave the Postmaster-General the right to discontinue the whole service whenever the public interest, in his judgment, should require it. Therefore, it appears clear that though so long as this contract remained in force there could be no change in pay for increases or decreases

of service, it was also intended to repose in the Postmaster-General the power to terminate the existence of the contract when, in his judgment, such decrease should become so great as to make a discontinuance necessary in the public interest.

Believing that the public interest demanded such discontinuance, the Postmaster-General did so discontinue the service under the claimant's contract, allowing him the one month's extra pay in accordance with these provisions.

It is contended on the part of the claimant that this was a breach of the contract, for the alleged reason that the United States were obliged, under the terms of the contract, to continue it without diminution of pay, notwithstanding the decrease in the service, and that the Postmaster-General had no power to discontinue the remaining service under the claimant's contract, but only to discontinue the whole mail service.

On behalf of the United States it is insisted that the acts of the Postmaster-General were in all respects in accordance with the power reserved to him in the contract itself.

The right of the Postmaster-General to discontinue the service.

1. The right to discontinue the service is provided for by the Postal Laws and Regulations, section 817, edition 1887 (in force at the time of the execution of the contracts), which section provides that—

> The Postmaster-General may discontinue or curtail the service on any route, in whole or in

> part, in order to place on the route superior service, or whenever the public interests in his judgment shall require such discontinuance or curtailment for any other cause, he allowing as full indemnity to the contractor one month's extra pay on the amount or service dispensed with, and a pro rata compensation for the amount of service retained and continued.

This regulation, made in accordance with Revised Statutes, section 161, conferring upon the Postmaster-General the right to make regulations not inconsistent with law, is thus given the full force and effect of a statutory enactment. (*Gratiot* v. *The United States*, 4 How., 80, 117; *ex parte Reed*, 100 U. S., 13; *Smith* v. *Whiting*, 116 U. S., 181.)

The contract being one made for the transportation of the mails was, by necessary implication, subject to this regulation in so far as the contract provisions themselves did not supersede it. To a like extent it was made subject to the regulation by a specific provision, as follows:

> And this contract is further to be subject to all the conditions imposed by law and the several acts of Congress relating to post-offices and post-roads. (Rec., p. 8.)

By reference to the provision of the contract it will be observed that the effect of the regulation was modified with reference to the allowance of only pro rata pay in case of curtailment or partial discontinuance, but the right to discontinue was left unaffected, in fact was affirmed.

Counsel for claimant puts much stress upon his contention that this regulation could not be applicable in any respect to the contract under consideration for the reason, as he alleges, that it was designed to apply to another class of transportation service, and further that its provisions are inconsistent with the provisions of the contract to the effect that no allowance will be made for increase or decrease in service, and, therefore, that the provision of the regulation relating to the right to discontinue the whole service can have no application to a wagon contract.

There is no merit whatever in this contention. The regulation is a general regulation which is found under the general subject of the transportation of the mails. It has its broadest and, in fact, its complete application to star and steamboat service where these provisions with reference to the curtailment of the service and the allowance of a pro rata compensation for the amount of service retained and continued, as well as the provision relating to the discontinuance of the service, are effective. Both features of this regulation, that is, the one with reference to the discontinuance of the service, and the other with reference to the curtailment of the service, apply to all classes of service under formal contract for the transportation of mails, unless there be statutory provisions, as in the case of transportation by railroads where Congress has fixed the rate of pay, or in the case of wagon service in the cities such as the one under consideration where

the special conditions of that service require contract provisions in substitution for that relating to curtailment.

The wagon service in cities is a service which, in point of historical sequence, originated subsequent to the star service, which is for the transportation of mails across the country without regard to the mode thereof. With reference to the needs of service between points in a city, different conditions exist than are found in the service between post-offices removed from each other in the country. The growth of the city is rapid. New postal stations are constantly being established, new railroad depots may be built or existing ones changed in location, new points of exchange of mails become necessary, and points which exist at the beginning of a contract may be discontinued or changed in location. These conditions necessitate a contract provision which would allow the continuance of the rate of pay during the existence of the contract without the continual changes which would be necessary if the provision of the regulations relating to pro rata increase or decrease in pay should obtain.

Therefore, the contracts for this class of service make an exception in this particular to the provision of this regulation; but it should be noted that the exception made is only in this one particular, and leaves unimpaired the general provision with reference to the right to discontinue the service. The result, therefore, is that this regulation is fully applicable to this class of contracts as well as to other classes of transportation contracts, excepting in so far as the

contract itself supersedes it, and, therefore, the power reserved therein to the Postmaster-General to discontinue the service is fully applicable.

2. Although it is insisted that the provision of this regulation fully authorized the Postmaster-General to discontinue the service under complainant's contract it is not relied upon wholly, because it is quite unnecessary to seek any other authority for that right than that which is found in the express terms of the contract itself.

The advertisement provides as follows:

> There will be no diminution of compensation for partial discontinuance of service, or increase of compensation for new, additional, or changed service that may be ordered during the contract term; but the Postmaster-General may discontinue the entire service on any route whenever the public interests, in his judgment, shall require such discontinuance, he allowing as full indemnity to the contractor one month's extra pay. (Rec., pp. 4, 14.)

The contract not only makes this a part of itself, but by further express stipulation provides as follows:

> It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster-General may change the schedule and termini of the route, vary the route, increase, decrease, or extend the service thereon, without change of pay; and that the Postmaster-General may discontinue the entire service whenever the public interest, in his judgment, shall require such discontinuance; but for a total dis-

continuance of service the contractor shall be allowed one month's extra pay as full indemnity. (Rec., p. 7.)

In these provisions we find the most ample authority in unequivocal language. There are two subject-matters in these provisions, each of which is entirely distinct from and independent of the other. The first is that for an increase or decrease in service there will be no change in pay. The second is that the Postmaster-General may discontinue the entire service when in his judgment the public interests demand it. These have no relation with each other, not being necessarily connected in meaning and being set off from each other by semicolons and the use of conjunctions, which clearly show their independence.

3. The right to discontinue mail service under a regulation similar to the one above quoted has been determined by this court.

The practice to so discontinue has been officially advised by the Attorney-General under practically identical conditions, and must be presumed to have become an executive construction by the Postmaster-General.

(a) This court passed upon the question in the case of *Garfielde* v. *The United States*, 93 U. S., 242, affirming the right of the Postmaster-General to so act. Counsel for claimant urges that this case is not relevant, because the advertisement for that service contained section 263 of the Postal Laws and Regulations (which is the same as 817 herein relied upon), and

Garfielde's proposal stated that he had full knowledge of the laws and regulations of the Department on the subject. It is therefore claimed by counsel for claimant that this regulation was part of the express contract, and that the case, therefore, differs essentially from the one at bar.

There does not appear to be any merit in this contention, because it is immaterial how the claimant becomes bound by the provisions of the regulation, whether they be recited specifically in the advertisement or whether, as in the case at bar, the contract is by necessary implication made subject to the provisions of the same regulation found in the Postal Laws and Regulations. In either case the only material question is whether under such provision the Postmaster-General was justified in terminating the service under the contract. In the Garfielde case this court has said that he was so justified.

It is urged here further on behalf of the United States that even if this court were not of opinion that section 817 of the Postal Laws and Regulations is applicable to the contract in question, this case of Garfielde is determinative because the question at issue there is practically the same question which is presented in this case under the *provision of the contract itself* with reference to the right of the Postmaster-General to discontinue the service.

This question of the Postmaster-General's right to discontinue the service under the contract containing substantially like condition, has been referred to with ap-

proval by this court in the case of *Chicago and Northwestern Railway Company* v. *The United States*, 104 U. S., 680.

In that case the railway company had entered into a contract with the Postmaster-General for the transportation of the mails at the rate fixed by the statute, which contract contained a provision authorizing the Postmaster-General to discontinue or curtail the service in whole or in part, he allowing as an indemnity to the contractor one month's extra pay on the amount of service dispensed with and a pro rata compensation for that retained and continued. Apparently this provision of the contract was the same as section 817 of the Postal Laws and Regulations, 1887, hereinbefore referred to.

While the power granted the Postmaster-General to discontinue, under this provision, was not exercised in that case, this court clearly recognized that power in the statement as follows:

> It is true that under this reservation the Postmaster-General would be authorized to discontinue the entire service contemplated by the contract, and the practical effect of that would be to terminate the contract itself on making the indemnity specified (p. 684).

(b) In the 19 *Opinions of the Attorney-General*, 147, 148, substantially the same question as herein involved was under consideration, namely, the right to discontinue service (or contract) under the reservation made in section 817, Postal Laws and Regulations, the same

as in the case at bar, before the end of the term of the contract. The cases are similar in all substantial features, the only difference being that in this case provision is made for the increase or decrease of service without increase or decrease of pay, whereas in the case cited such increase or decrease might be made only with a pro rata change of pay. That portion of the provision with reference to the right to discontinue the entire service or the contract is the same.

The advantage to the contractor of a continuance under either provision was exactly the same, the fact of advantage not being in any wise affected by this variation of terms under which such arose, for it must be evident that it is in effect just the same to the contractor whether he is deprived of the privilege, under the terms of the contract, to perform extra service at pro rata increased pay, or whether he is deprived of continuing his performance under the terms of his contract without diminution of pay for decreased service. In that case the Attorney-General said:

> The changing interests of the public and the good of the service may require that the number of mails in a given time should be increased after the contract shall have been made. If but a single mail a week is called for in the advertisement for the letting of a contract, bidders would be likely to ask for a higher price for the carrying of that single mail than they would for each of a larger number of mails on the same route within the same time. To provide

for such a change, when just and expedient, section 817 of the Postal Laws and Regulations provides:

(Here follows the language of said section, as hereinbefore set out.)

> This regulation is, in substance, incorporated in the instructions given by the Department to bidders for contracts, and constitutes a part of the contract when made. The regulations and instructions give full notice to bidders and contractors that the Postmaster-General reserves to himself the power to discontinue a given service whenever the public interests, in his judgment, shall require it.

That is to say: If, after the contract is entered into, it becomes apparent to the Postmaster-General that by reason of changed conditions requiring augmented service, which may be secured by the discontinuance and the reletting of the service for a less sum than would have to be paid to the contractor, even though his contract expressly provides for such augmentation of the service with the increased and larger sum paid to himself, nevertheless it is in the discretion of the Postmaster-General to discontinue and readvertise the same, and that exercise of discretion can not be questioned, nor can the contractor complain, because he has had ample notice and consented in advance to the reservation of such right.

If there is any difference between the case considered by the Attorney-General and this one with respect to the source of authority for the act of dis-

continuance, it is that in the one case it was the regulation (similar to the one cited, *supra*) and in the other it is practically the same provision, but found in the contract itself. If it should be held that this difference does exist, still it is immaterial, as the provision is substantially the same in both instances.

The grounds on which the discretion was exercised and the facts which constituted them.

The grounds upon which such discretion could be exercised are as follows:

1. Section 817, Postal Laws and Regulations, 1887, supra, provides that such discontinuance may be made, (*a*) "In order to supply on the route superior service;" (*b*) "Or whenever the public interests, in his judgment, shall require such discontinuance or curtailment for any other cause."

2. The instructions to bidders, set forth in the advertisement and made a part of the contract, provide that the Postmaster-General may discontinue the service "whenever the public interests, in his judgment, shall require such discontinuance." The contract specifically provides, further, that he may discontinue the service "whenever the public interests, in his judgment, require such discontinuance."

The claimant's services required under the original schedule of the advertisement had been greatly decreased by reason of the inauguration of a new and improved service and a diversion thereto of mails

which were to have been carried by the claimant under his contract.

As to the legality and wisdom of the acts of the Postmaster-General thereupon no better estimate can be submitted than that expressed by Mr. Justice Wright in delivering the opinion of the Court of Claims in the case of *Luther Clay Slavens* v. *The United States* (38 C. Cls., p. 574). The reasoning set forth there is entirely applicable to this case, inasmuch as the case at bar was considered by the Court of Claims in connection with the Slavens case and made to depend upon the reasons set forth therein. The following is from the opinion of the court and delivered by Mr. Justice Wright:

> It is also insisted that the change of part of the service from covered regulation wagon to street-railway service was unwarranted by the contract. We are unable to give effect to the terms of the contract giving authority to vary the routes, increase or decrease or extend the service thereon, without supporting the change to street-railway service, the only effect of which was to decrease the service undertaken by claimant, and which was clearly authorized by the contracts. The cause or reason why such change or decrease of service might be made was not stated in the contracts, but left to the discretion of the Postmaster-General. * * *
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> After the service had been decreased, as stated, the Postmaster-General submitted to claimant a proposition or suggestion that he voluntarily relinquish part of the contract price

for the continued performance of the services remaining after the change of a part thereof to the street railways, but claimant declined, in which no doubt he was clearly within his rights. In other words, he was under no obligation, under the contracts, to continue at a reduced price. So, therefore, the proposition and its rejection had no effect whatever upon the rights of either party as defined by the contracts, and such were left to be determined by the provisions thereof, according to the terms and stipulations contained therein. The contracts gave the Postmaster-General authority to discontinue the entire service whenever the public interest, in his judgment, should require such discontinuance, the claimant in such case to be allowed one month's extra pay as full indemnity, and this he did in the Boston and Brooklyn contracts.

Against this action of that officer it is argued that he discontinued the service because claimant declined to continue at a reduced rate, but we have not found the action of the officer was so influenced. We must presume, nothing appearing to the contrary —and it does not— such action was influenced solely because, in his judgment, the public interest required the discontinuance of claimant's services under the contracts in question. We can see, also, there was good reason for such conclusion. The service had been rightfully decreased, under the stipulations of the contracts, until the services remaining to be performed were not reasonably worth the original contract rate, and to have continued its payment would have been

contrary to public interests; and while claimant was under no obligation to continue in the service at a reduced rate, the head of the Department was obligated, as well by the duties of his high office as the provisions of the contract, to subserve the public interests in taking care that no unreasonable compensation was paid for the services actually performed. (Rec., pp. 51, 52.)

The discontinuance.

It is contended by counsel for claimant that the action of the Postmaster-General was a discontinuance of the contract, and not a discontinuance of the service.

The facts are that the order of discontinuance read "Discontinue service," etc. (Rec., p. 8), and all the service under claimant's contract was actually discontinued. It is wholly immaterial whether the Postmaster-General did or did not enter into a subsequent contract with the claimant or someone else to perform the remaining service. The discontinuance of the service of the claimant was a discontinuance of "the entire service" on the route within the meaning of the provision of the contract (Rec., pp. 4, 7), and the discontinuance of the service in whole within the meaning of section 817, *supra*.

A reasonable and not an absurd or impossible construction must be placed upon the provision of the contract. The contract itself provides that the service may be increased or decreased and that the entire service

on the route may be discontinued. It may be asked, therefore, What service may be discontinued under the contract? Evidently the service as originally contracted for or the service as *increased or decreased by subsequent orders*. In this case it was the service as decreased by this change. The remaining service, therefore, within the contemplation of this contract, became the entire service. It was all the service which the contractor was required to perform under his contract. "Entire service" can mean no more than all the service which was or might be required of the contractor, and if he had been relieved of the performance of some part of the service by the substitution of a superior service, then in that event his entire service would only be such part of the original service as remained by him to be performed.

On the opposing theory, what would have been necessary to be done by defendants to comply with the construction placed upon the contract by the claimant? Evidently nothing less than the discontinuance of the service remaining under the contract to be performed and also the superior service which had been substituted for it, and the refusal to provide for any mail service whatever upon the route.

To say that the provision in question meant an actual cessation of all service is to advance a theory which is wholly contrary to all practice in the postal service, and which must contemplate a gradual and certain cessation of mail service rather than its growth and increase. It would have been absurd to discontinue the superior service which had been placed on

the route, the maintenance of which was the only reason for desiring the discontinuance at all. It would have resulted to defeat the purposes of the postal service to have failed to provide for service on the remainder of claimant's route.

It is quite immaterial what phraseology is used, whether it be spoken of as a discontinuance of the service or as a discontinuance of the contract. It is in effect in either case a discontinuance of the *service contemplated by the contract.* In this connection see the opinion of the Attorney-General (19 Op. A. G., supra); also *Chicago and Northwestern Railway Company* v. *The United States* (104 U. S., 684), where this court say the Postmaster-General "would be authorized to discontinue the entire service contemplated by the contract, and the practical effect of that would be to terminate the contract itself."

There can be no merit, therefore, in the contention that the act of the Postmaster-General was not a discontinuance of the entire service as contemplated by the contract.

It seems very clear that the action of the Postmaster-General in discontinuing the service under complainant's contract was in accordance with the provision of the contract itself, and fully warranted, and, therefore, that the judgment of the Court of Claims was fully warranted.

LOUIS A. PRADT,
Assistant Attorney-General.

JOSEPH STEWART.

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No. 84.

Mr. Justice DAY delivered the opinion of the Court.

This case was argued with *Slavens* v. *The United States*, No. 228, just decided. It involves the same question as to the right of the Postmaster General to terminate a mail contract. The Court of Claims dismissed the petition. (38 Ct. of Clms. 590.) For the reasons stated in the opinion in the Slavens case, the judgment of the Court of Claims is

Affirmed.

True copy.

Test:

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